RECORD
AND
BRIEF

No. 16-1161

IN THE

Supreme Court of the United States

BEVERLY R. GILL, *ET AL.*,

Appellants,

—v.—

WILLIAM WHITFORD, *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF OF COMMON CAUSE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*

Amicus Common Cause files this brief in support of Plaintiffs-Appellees William Whitford, *et al.*[1]

Founded in 1970, *amicus* is a nonprofit, nonpartisan organization dedicated to protecting and strengthening democracy and the democratic process. *Amicus* has, among other things, led the movement to lower the voting age to 18; led the coalition to enact Home Rule in Washington, D.C.; and spearheaded the passage of freedom-of-information laws, government-ethics laws, and laws permitting public financing of campaigns and limiting the corrupting influence of money in politics.

Partisan gerrymandering is an issue of longstanding interest to *amicus*. In 2008, it led a landmark California ballot initiative that put an independent citizens' commission in charge of redistricting, ending partisan gerrymandering in that state. Since then, it has engaged in litigation and advocacy in opposition to political gerrymandering by both major parties, including before this Court. *See, e.g.*, Brief of *Amici Curiae* Common Cause & Campaign Legal Center in Support of Petitioners, *Shapiro* v. *McManus*, No. 14-990 (arguing that "the Maryland legislature...dis-

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its employees, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

criminat[ed] against Republican voters" in drawing Congressional districts).

Most importantly for present purposes, *amicus* is the lead plaintiff in *Common Cause* v. *Rucho*, No. 1:16-cv-1026 (M.D.N.C. filed Aug. 5, 2016) ("*Common Cause*"), a pending partisan-gerrymandering challenge to North Carolina's 2016 Congressional redistricting plan. Discovery in *Common Cause* is complete, and the case is trial-ready. It may come before this Court as soon as this Term.

Amicus believes that the plaintiffs in this case have convincingly proven their claims and should prevail. They presented direct, "smoking gun" evidence that improper partisanship drove Wisconsin's map-drawing process from start to finish. As *amicus* explains below, under well-settled First Amendment doctrine, that should be enough; plaintiffs' quantitative evidence of the gerrymander's severity and durability was just icing on the cake. But however the Court decides this appeal, it should not prejudge or foreclose other cases, such as *Common Cause*, that involve different facts, theories, and evidence.

STATEMENT OF FACTS REGARDING THE *COMMON CAUSE* LITIGATION

Below, *amicus* summarizes the sordid state of partisan politics in North Carolina; the egregiously partisan process that generated North Carolina's 2016 Congressional Plan (the "2016 Plan"); and the progress of *amicus*'s lawsuit challenging that plan.

A. Partisan Politics in North Carolina

North Carolina is the archetypal "purple state": its electorate is split down the middle. Results in statewide races reflect this. For the last four quadrennial elections, the chart below shows which party's candidate won each top-tier statewide race and the margin of victory. The results are divided evenly (8–7) between Republicans and Democrats. Eleven of the 15 races were won by single-digit margins, and three by less than half of a percentage point:

	2004	2008	2012	2016
President		D +0.4	R +2	R +4
U.S. Senate	R +5	D +9	n/a	R +6
Governor		D +3		D +0.2
Lieut. Gov.		D +5	R +0.2	R +7

But one would never guess this from the makeup of North Carolina's legislature or its Congressional delegation. Its districts are so egregiously gerrymandered that the Republican Party commands *veto-proof supermajorities* in both legislative houses and a *10–3 supermajority* in the State's Congressional delegation. In recent months, Republicans have used this veto-proof control to further entrench themselves in power in a series of controversial party-line votes—for example, shifting the partisan makeup of the statewide and county Boards of Elections in Republi-

cans' favor and placing a Republican in charge of the state Board of Elections during all even-numbered years (*i.e.*, all years when major elections occur).[2]

This Court has struck down North Carolina's district lines twice this year alone—but on the grounds of race, not partisanship. *See Cooper* v. *Harris*, 137 S. Ct. 1455 (2017) (affirming ruling that two districts in North Carolina's 2011 Congressional map are racial gerrymanders); *North Carolina* v. *Covington*, 137 S. Ct. 2211 (2017) (summarily affirming *Covington* v. *North Carolina*, 316 F.R.D. 117 (M.D.N.C. Aug. 11, 2016), which ruled that 28 districts in North Carolina's 2011 state House and Senate redistricting plans were racial gerrymanders). So have multiple lower courts. *See Raleigh Wake Citizens Ass'n* v. *Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016); *Greensboro* v. *Guilford Cnty. Bd. of Elections*, No. 1:15-CV-559, 2017 U.S. Dist. LEXIS 50064 (M.D.N.C. Apr. 3, 2017). Of course, in North Carolina, as elsewhere, there is an "inextricable link between race and [party] politics" because "the race of voters correlates with the selection of...candidates." *N. Carolina State Conf. of NAACP* v. *McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (quoting *Thornburg* v. *Gingles*, 478 U.S. 30, 62 (1986) (discussing North Carolina)), *cert. denied*, 137 S. Ct. 1399 (2017).

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[2] *See* Mark Joseph Stern, *North Carolina Republicans' Legislative Coup Is an Attack on Democracy*, SLATE, Dec. 15, 2016, http://slate.me/2hKOJow; Mark Joseph Stern, *North Carolina GOP Votes to Dilute Governor's Power and Curtail Voting Rights—Again*, SLATE, Apr. 12, 2017, http://slate.me/2otCHCp.

B. The 2011 Plan

This Court is familiar with the 2011 North Carolina Congressional plan ("2011 Plan") from its recent decision in *Cooper* v. *Harris*. That plan was first used in the 2012 Congressional election. Even though the Democratic Party won the majority of the statewide Congressional vote that year, and even though North Carolina's delegation had historically split 7–6 or 6–7, the 2011 Plan resulted in a 9–4 partisan advantage for Republicans. After the 2014 election, that gulf widened even further to 10–3.

Although the 2011 Plan was the result of both political and racial gerrymandering, *Harris* challenged the 2011 Plan as a racial gerrymander only. The State's "defense"—in public, at trial, and before this Court—was that the Plan was intended to disadvantage *Democrats*, not African-Americans. In other words, in an attempt to escape liability for racial gerrymandering, the State openly admitted that the 2011 Plan was an intentional partisan gerrymander. At trial, Dr. Thomas B. Hofeller, who drew the challenged map, testified that "[p]olitics was the primary...determinant in the drafting," and that the "overarching goal...was to create as many safe [or] competitive districts for Republican[s]...as possible." At oral argument before this Court, the State's counsel conceded that Dr. Hofeller "drew the map to draw the Democrats in and the Republicans out."

Notwithstanding the State's "party, not race" defense, this Court affirmed the decision of the District Court invalidating two districts in the 2011 Plan as racial gerrymanders. *Harris*, 137 S. Ct. at 1463.

C. The 2016 Plan

On February 5, 2016, the District Court in *Harris* ordered that a new Congressional map be promptly drawn. In response, Representative David Lewis and Senator Robert Rucho—both Republicans—engaged Dr. Hofeller, who had drawn the unconstitutional 2011 Plan, to create a new map that would cure the racial gerrymander, while preserving the 10–3 Republican advantage from the 2011 Plan.

At a meeting of the Joint Congressional Redistricting Committee, Representative Lewis presented a set of seven written criteria for the development of the 2016 Plan. These criteria were adopted by a straight party-line vote of the Joint Committee. The final 2016 Plan was also adopted by straight party-line votes in both legislative chambers.

The adopted criteria were explicitly and thoroughly partisan. Most obviously, the criterion labeled "Partisan Advantage" stated:

> **Partisan Advantage**
>
> The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation.

Similarly, the criterion labeled "Political data" stated:

Political data

> The only data other than population data to be used to construct congressional districts shall be election results in statewide contests since January 1, 2008, not including the last two presidential contests.

Even purportedly non-partisan criteria drew partisan distinctions: under the criterion labeled "Compactness," for example, Dr. Hofeller was authorized to—and in fact did—split counties for reasons of "political impact."

The legislators primarily responsible for the 2016 Plan unabashedly admitted their partisan motivation. Among many others, Representative Lewis made the following public statements about the 2016 Plan:

- "[W]e want to make clear that to the extent we are going to use political data in drawing this map, it is to gain partisan advantage. ... I'm making clear that our intent is to use ... the political data ... to our partisan advantage."

- "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."

For his part, Senator Rucho literally stated that the 2016 Plan "would be a political gerrymander." In his understanding, there was "nothing wrong with politi-

cal gerrymandering"—no matter how extreme or brazen—because "[i]t is not illegal."

Just as intended, 10 Republicans and 3 Democrats were elected to Congress from North Carolina in 2016. Thus, Republicans won 77% of North Carolina's Congressional seats to Democrats' 23%—even though the Republican Party received just 53% of the statewide Congressional vote to Democrats' 47%. The gerrymandering of the 2016 Plan was so extreme that, had the two parties' statewide vote shares been reversed, *just a single Congressional seat* would have flipped Democratic; the Republican Party would *still* have won a 69% supermajority of the State's Congressional seats with a minority of the statewide vote.

D. Procedural History

In August 2016, *amicus*, along with the North Carolina Democratic Party and 14 voters from all 13 Congressional districts, filed a complaint challenging the 2016 Plan as an unconstitutional partisan gerrymander. The operative pleading alleges that the 2016 Plan—both "as a whole, and [as to] each...individual district[]"—violates the First Amendment (Count I), the Equal Protection Clause (Count II), and Article I, § 2 of the U.S. Constitution (Count III). Plaintiffs also allege that, in adopting the 2016 Plan, the Legisiature exceeded the authority delegated to it by the Elections Clause (Count IV). Compl., *Common Cause* v. *Rucho,* No. 1:16-cv-1026 (M.D.N.C. Aug. 5, 2016), at 17-25. In March 2017, a three-judge District Court denied the defendants' motion to dismiss, *Common Cause* v. *Rucho*, No. 1:16-cv-1026, 2017 U.S. Dist.

LEXIS 30242 (M.D.N.C. Mar. 3, 2017), and discovery ensued.[3]

As described further below (Point III.C), the plaintiffs retained two experts—one in political science and one in mathematics—to demonstrate (1) that the 2016 Plan could not have been drawn without the intent to systematically favor the Republican Party; and (2) that the 2016 Plan could not be justified as necessary to comply with traditional redistricting criteria. Those experts used computers to generate tens of thousands of alternative districting maps using only neutral principles and completely disregarding partisan identification. The experts then used actual voting data from each geographic precinct in North Carolina to simulate an election under each of these alternative maps. The cumulative results of these thousands of simulations were then used to calculate the probability that the 10–3 partisan split under the 2016 Plan was attributable to compliance with traditional districting criteria, rather than intentional partisan gerrymandering. Both experts concluded that this probability was essentially zero.

Common Cause was originally scheduled for trial in late June of 2017. Trial was adjourned by the District Court for undisclosed reasons. The State filed a motion to stay the proceeding pending this Court's judgment in the instant appeal, which plaintiffs opposed. That motion was denied on August 29, 2017.

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[3] *Common Cause* has been consolidated with another partisan-gerrymandering challenge to the 2016 Plan, *League of Women Voters of N. Carolina* v. *Rucho*, No. 1:16-cv-1164 (M.D.N.C. filed Sept. 23, 2016).

SUMMARY OF ARGUMENT

This Court has repeatedly held that partisan-gerrymandering claims are justiciable. Wisconsin asks the Court to overrule those precedents and hold that such claims present non-justiciable "political questions"—at least when brought on a statewide basis. The Court should reject that invitation. That the courts have not yet converged on a single definitive formula to make out a partisan-gerrymandering violation is no reason to quit the project, especially as courts have only just begun to seriously consider the First Amendment framework that Justice Kennedy proposed in *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004). And there is *certainly* no reason for courts to withhold relief in egregious cases involving direct evidence of naked partisan manipulation, such as this case and *Common Cause*. To declare this whole area of the law permanently off-limits to the courts would not only permit the continued deterioration of our democracy, it would actively sanction and accelerate it.

Amicus submits that Justice Kennedy's First Amendment framework from *Vieth* provides a path out of the doctrinal wilderness. Partisan gerrymandering clearly violates the First Amendment: it is classic viewpoint discrimination, and it transgresses the longstanding First Amendment norm of nonpartisanship in official State action. Furthermore, First Amendment analysis is exceedingly straightforward: when a State targets individuals for unfavorable treatment because of their politics, that action is unconstitutional unless the State demonstrates narrow tailoring and a compelling interest. Courts apply this same analysis in First Amendment cases every day. Concepts such as "predominance," "severity," and

"durability" play no role. Unfortunately, in this case, the District Court largely conflated the plaintiffs' First Amendment and Equal Protection Clause claims, complicating the analysis and placing an unwarranted burden on the plaintiffs to prove a First Amendment violation. Plaintiffs met that burden—but they should not have had to.

Finally, however the Court resolves this appeal, it should take care not to foreclose or prejudge other pending partisan-gerrymandering cases that present different facts, theories, and evidence. *Common Cause*, in particular, involves federal, not State-level, districting; it presents district-by-district challenges, as well as a statewide challenge; and it emphasizes a different type of social-science evidence than what was relied upon below. If, for whatever reason, the Court were to reverse the District Court in this case—and it should not—it is important that it leave the door open for *amicus* and others to pursue their own, distinct cases.

ARGUMENT

I. PARTISAN-GERRYMANDERING CLAIMS ARE JUSTICIABLE

This Court has recognized that "[p]artisan gerrymanders...are incompatible with democratic principles," *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (cleaned up), and has repeatedly held that partisan-gerrymandering claims are justiciable, *see Davis* v. *Bandemer*, 478 U.S. 109, 118–27 (1986); *Vieth*, 541 U.S. at 309–12 (Kennedy, J., concurring in the judg-

ment); *LULAC* v. *Perry*, 548 U.S. 399, 414 (2006); *Shapiro* v. *McManus*, 136 S. Ct. 450, 456 (2015).

Originally, Wisconsin asked this Court to overrule all of these holdings. Jurisdictional Statement 40. It now asks the Court to "hold that political-gerrymandering claims are nonjusticiable, *at least for statewide claims*," and acknowledges that "this Court need not decide here whether...claims brought on [a district-specific] theory are justiciable." Appellants' Br. 36–37 & n.9 (emphasis added). As discussed below, Wisconsin's justiciability arguments are meritless. On the other hand, *amicus* agrees that this Court need not make a blanket ruling about the justiciability of *all* partisan-gerrymandering claims in this appeal. *See Baker* v. *Carr*, 369 U.S. 186, 217–18 (1962) (political question doctrine requires consideration of "the precise facts and posture of [each] particular case").

A. That Partisan Gerrymandering Is Old Does Not Immunize It From Attack

Wisconsin begins its brief with a discussion of the history of partisan gerrymandering, suggesting that the practice should be immune to constitutional challenge because it has existed for "centuries." Appellants' Br. 1, 5–10. That argument fails for two reasons.

First, as far as history goes, the Framers' intent at the time the Constitution was drafted and ratified matters more than the four isolated examples of pre-Civil War gerrymandering that Wisconsin has mustered. And the Framers' intent could hardly be clearer. Hamilton lambasted the "intolerant spirit" of "po-

litical parties," THE FEDERALIST No. 1, and described the Constitution as an "attempt[]...to abolish" them, Alexander Hamilton, Speech on the Senate of the United States, 2 THE WORKS OF ALEXANDER HAMILTON 57 (Henry Cabot Lodge, ed. 1904). John Adams wrote that "[t]here is nothing which I dread so much, as a division of the republic into two great Parties," which he deemed "the greatest political Evil under our Constitution." John Adams, Letter to Jonathan Jackson, dated Oct. 2, 1780, 9 THE WORKS OF JOHN ADAMS 512 (C.F. Adams, ed. 1854). Jefferson declared that "[i]f I could not go to Heaven but with a party, I would not go there at all." Thomas Jefferson, Letter to Francis Hopkinson, dated Mar. 13, 1789, 5 THE WORKS OF THOMAS JEFFERSON 456 (P.L. Ford, ed. 1905). And Washington called political parties "the[] worst enemy" of democracies, warning that, if allowed to take root, they would "subvert[] the power of the people" and "usurp...the reins of government." George Washington, Farewell Address, dated 1796, 13 THE WRITINGS OF GEORGE WASHINGTON 298, 301 (W.C. Ford, ed. 1892). These are not the words of men who condoned partisan gerrymandering.

Second, in all events, "the past alone [does not] rule the present." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2598 (2015). Wisconsin's argument from history applies *a fortiori* to geographic malapportionment, which has an even more ancient pedigree than partisan gerrymandering. Obviously, however, that did not stop this Court from deciding the one-person-one-vote cases as it did. Arguments from history are especially weak when circumstances have changed, *Lawrence* v. *Texas*, 539 U.S. 558, 571–72 (2003), and both the degree of partisan polarization and the technolo-

gy available to gerrymanderers have changed markedly since Elbridge Gerry's day. Appellees' Br. 21–23; *see Vieth*, 541 U.S. at 345 (Souter, J., dissenting) ("[T]he increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine.").

B. Wisconsin's "Manageable Standards" Argument Is A Red Herring

History aside, Wisconsin's justiciability argument boils down to the perceived absence of a single bright-line test that will neatly divide all unconstitutionally gerrymandered maps from all lawful ones. This argument is misplaced for at least three reasons.

First, in other categories of voting-rights cases, this Court has never required plaintiffs to proffer a fully articulated doctrinal and social-science framework before granting relief. *See Vieth*, 541 U.S. at 310–11 (Kennedy, J., concurring) (discussing the "more patient approach" of the one-person-one-vote cases). Instead, the Court has announced general principles, leaving lower courts to develop standards "with reference to both quantitative and qualitative markers that emerge as important over time." Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship* 15–16, 116 MICH. L. REV. (forthcoming Dec. 2017), http://bit.ly/2iahegE (hereinafter "Kang").

The proceedings below fall comfortably within this tradition. This Court can and should affirm, even if it is not prepared to say that the doctrinal framework and social-science metrics employed in this case constitute the last, best word on the matter. It is no re-

sponse to argue, as Wisconsin does, that lower courts have had "13 years since *Vieth*" to agree on a framework, Jurisdictional Statement 40, as many of those courts have misread the Court's fractured pronouncements in *Vieth* as prohibiting the case-by-case exploration that would have been necessary to converge on a standard. *See* Kang, *supra*, at 15–16.

Second, as *amicus* explains in Part II below, the quest for a quantitative "magic formula" in partisan-gerrymandering cases stems largely from prior plaintiffs' exclusive reliance on the *Equal Protection Clause*. However, as Justice Kennedy observed in *Vieth*, such challenges are better suited to adjudication under the *First Amendment*, as the analysis under that provision is straightforward, even routine. Lower courts have only just begun to apply Justice Kennedy's First Amendment theory. *See, e.g.*, *Shapiro* v. *McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016) ("[W]ell-established First Amendment jurisprudence...provides a well-understood...discernible and manageable standard.").

Third and finally, even if the Court were convinced that it is impossible to coin a test that can resolve *every* claim, that would not "justify a refusal 'to condemn even the most blatant violations....'" *Cox* v. *Larios*, 542 U.S. 947, 950–51 (2004) (Stevens, J., concurring); *see* Kang, *supra*, at 4 ("[C]ourts need not obsessively weigh partisan effects" in "egregious cases"). Justice Kennedy's controlling opinion in *Vieth* recognizes this. In his view, the cases that demanded "manageable standards" were those where "a legislature...attempt[s] to reach [a partisan] result *without* [an] express [partisan] directive." 541 U.S. at 312

(emphasis added). On the other hand, he recognized, "[i]f a State...declared" *expressly* that district lines "'shall be drawn so as most to burden Party X's rights to fair and effective representation,'...we would surely conclude," without more, that "the Constitution had been violated." *Id.*

That is essentially what happened in Wisconsin in this case and, as narrated above, that is exactly what occurred in North Carolina in *Common Cause*. At an absolute minimum, then, direct-evidence cases like these must be justiciable. No formulas or social-science tools are needed to "smoke out" improper partisanship when the record shows it explicitly—let alone when a State has *confessed* to it.

C. The Political Question Doctrine Is Not A Suicide Pact

Wisconsin's justiciability argument misses the mark for yet another reason. The "political question" doctrine serves the admirable purpose of showing respect for the political branches, especially where their institutional competence is superior. But that purpose cannot be pursued at all costs. As "a tool for maintenance of governmental order," the doctrine must "not be so applied as to promote only disorder." *Baker*, 369 U.S. at 215. When judicial action is the only way to prevent political-process failure, this Court has never stood aside in deference to the very branches whose processes have failed. *See, e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 553–54 (1964) (intervening where "[n]o effective political remedy...against the alleged malapportionment...[was] available").

Importantly, the political question doctrine is, at least in part, a "prudential" limitation. *Nixon* v. *United States*, 506 U.S. 224, 252–53 (1993) (Souter, J., concurring in the judgment). As such, its "application ...ultimately turns...on 'how importunately the occasion demands an answer.'" *Id.* (quoting Learned Hand, THE BILL OF RIGHTS 15 (1958)). An act "might be so far beyond the scope of [the actor's] constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence." *Id.* at 253–54. More bluntly, the doctrine is not a suicide pact that compels the Court to stand mute while our democracy collapses around it.

That should be dispositive here. Partisan gerrymandering is undermining our democratic institutions further each day. Left unchecked, it threatens to leave us with a Potemkin democracy, where elections are held, but the results are always foreordained. And the very nature of partisan gerrymandering is such that, once the gerrymanderers are entrenched, there can be no recourse through political channels. Witness the situation in North Carolina, where an egregiously gerrymandered legislative map has given the Republican Party veto-proof control over an evenly divided State, and that party is using its unchecked power to ensure its perpetual reelection. *Supra* at 3–5. It cannot be that "prudence" requires this Court to turn its back while, one by one, other States follow North Carolina down this road.[4]

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[4] In a few States, this process failure may be addressed by citizen initiative. *See Ariz. Indep. Redistricting Comm'n*,

Importantly, by declaring partisan gerrymandering beyond judicial reach, this Court would not only *fail to prevent* serious harm to democracy; it would *actively accelerate* that harm. Justice Kennedy observed that, "if courts refuse to entertain any claims of partisan gerrymandering, the temptation to [engage in it] will grow." *Vieth*, 541 U.S. at 312. That is an understatement: a proclamation by this Court that the judiciary will never intervene would give a "constitutional green light" to legislators in every State to begin gerrymandering openly to the limit of what technology will allow. *Id.* at 345 (Souter, J., dissenting); *see Benisek* v. *Lamone*, No. JKB-13-3233, 2017 U.S. Dist. LEXIS 136208, at *45–46, *76–77 (D. Md. Aug. 24, 2017) (Niemeyer, J., dissenting) (describing the "absurd" and "extreme" gerrymanders that would result from such "judicial abdication"). In short, far from "maintain[ing]...governmental order," such a declaration by this Court would affirmatively "promote...disorder." *Baker*, 369 U.S. at 215.

II. THE FIRST AMENDMENT PROVIDES AN IDEAL FRAMEWORK FOR PARTISAN-GERRYMANDERING CLAIMS

The plaintiffs in this case allege, and the District Court held, that the gerrymander at issue violated not only the Equal Protection Clause, but also the First Amendment. *Amicus* agrees. Indeed, as Justice Kennedy suggested, the First Amendment provides the most logical framework for addressing partisan-gerrymandering claims. *Vieth*, 541 U.S. at 314.

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135 S. Ct. at 2661–62. But most States, including Wisconsin and North Carolina, lack that option.

However, in *amicus*'s view, the correct First Amendment analysis differs from that conducted by the District Court below. Under settled First Amendment doctrine, partisan gerrymandering violates the First Amendment *whether or not* it crosses some threshold of "severity" and/or "durability"—that is, unless the State can satisfy strict scrutiny. And while the District Court did not require plaintiffs in this case to show that partisanship was the map-drawers' "predominant" consideration, some have argued for such a requirement. Under the First Amendment, it is clear that no "predominance" requirement exists.

A. Partisan Gerrymandering Violates the First Amendment

Partisan gerrymandering is intentional State discrimination against a class of voters based on "their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J.); Appellees' Br. 36. Of course, political association and expression "constitute the core of those activities protected by the First Amendment." *Elrod* v. *Burns*, 427 U.S. 347, 356 (1976) (plurality). Indeed, the right of voters, "regardless of their political persuasion, to cast their votes effectively... rank[s] among our most precious freedoms." *Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983).

While a majority of this Court has yet to *apply* Justice Kennedy's First Amendment analysis to a partisan-gerrymandering claim, that First Amendment theory remains "uncontradicted by the majority in any [of this Court's] cases," *Shapiro*, 136 S. Ct. at

456, and has been accepted and applied by lower courts, *e.g.*, *Shapiro*, 203 F. Supp. 3d at 594–98. Moreover, it follows inexorably from settled precedent: in all other contexts, this Court has held that State-imposed "burdens" on political association and expression based on party identification "are unconstitutional." *Vieth*, 541 U.S. at 314 (Kennedy, J.); *see* Kang, *supra*, at 17. Specifically, two well-established lines of First Amendment jurisprudence intersect in partisan-gerrymandering cases.

First, it is black-letter law that a State "may not regulate" First Amendment activity based on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (citations omitted); *see, e.g.*, *Bd. of Ed.* v. *Pico*, 457 U.S. 853, 870–71 (1982) (explaining that "a Democratic school board" may not, "motivated by party affiliation, order[] the removal of all books written by or in favor of Republicans"). The "danger" of such viewpoint discrimination is that it allows the government to skew "free and open discussion in a democratic society." *Matal* v. *Tam*, 137 S. Ct. 1744, 1769 (2017) (Kennedy, J., concurring).

Partisan gerrymandering is viewpoint discrimination. When a State intentionally draws district lines so as to minimize the voice of one political party's adherents, that is State action burdening political expression and association on the basis of "ideology" or "perspective." *Rosenberger*, 515 U.S. at 829; *see Vieth*, 541 U.S. at 314 (Kennedy, J.); *Benisek*, 2017 U.S. Dist. LEXIS 136208, at *46–47, *72–73 (Niemeyer, J.) ("[W]hen district mapdrawers target voters based

on their prior, constitutionally protected expression in voting," they "effectively punish[] voters for the content of their voting practices").

This is no less true simply because members of the disfavored party may still cast a ballot or petition their legislators: viewpoint discrimination exists when disfavored voices are muffled, not merely when they are silenced. *See Tam*, 137 S. Ct. at 1752 (government's refusal to register offensive trademarks was unconstitutional viewpoint discrimination, even though unregistered trademarks "may still be used in commerce"); *cf. Kusper* v. *Pontikes*, 414 U.S. 51, 58 (1973) (restriction on primary voting violated the First Amendment even though it did not "deprive [voters] of *all* opportunities to associate with the political party of their choice" (emphasis added)).

Second, and more generally, the First Amendment forbids the States *qua* States from officially aligning themselves with one political party. *See* Kang, *supra*, at 17–22. For example, this Court has repeatedly struck down the practice of "patronage," or granting preferential treatment in public employment on the basis of "partisan political affiliation." *Elrod*, 427 U.S. at 349; *see also Branti* v. *Finkel*, 445 U.S. 507 (1980); *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62 (1990). Likewise, it has stated that "[g]overnment funds... cannot be expended for the benefit of one political party" over another. *Branti*, 445 U.S. at 518 n.12. And, while no State has ever dared try it, it would be an obvious First Amendment violation for a State to "pass a law that expressly and officially endorses" one party or its candidates. Kang, *supra*, at 18–19. Permitting a State to engage in partisan activity in its

official capacity "distort[s] the electoral process," *Branti*, 445 U.S. at 514 n.8, and threatens to "entrench[]" one party "to the exclusion of others," *Elrod*, 427 U.S. at 371. And that is true *a fortiori* where State action impacts the "electoral process" *directly*, as partisan gerrymandering does, as opposed to *indirectly*, as with political patronage.

"Given these stringent limitations on the government's ability to advance ideological motives" in other areas, "it would be strange indeed if a State's administration of elections were not similarly limited." *Benisek*, 2017 U.S. Dist. LEXIS 136208, at *75 (Niemeyer, J.); *see Kusper*, 414 U.S. at 57 ("[I]n exercising their powers of supervision over elections ..., the States may not infringe upon basic constitutional protections.").

B. The *Common Cause* Plaintiffs Advance A Distinct First Amendment Framework

The District Court held that partisan gerrymandering violates the Constitution if the impact is sufficiently "severe" and "durable." *Whitford* v. *Gill*, 218 F. Supp. 3d 837, 884, 902 n.269 (W.D. Wis. 2016). These requirements were drawn from this Court's Equal Protection cases—not its First Amendment cases. *See Vieth*, 541 U.S. at 291–93, 296 (plurality); *Bandemer*, 478 U.S. at 131–33. But these two provisions protect against different "underlying...constitutional harms," and thus require different analyses. *Vieth*, 541 U.S. at 294 (plurality).

Never has this Court required plaintiffs to prove that a First Amendment violation is "severe" or "durable" to warrant relief. *See Elrod*, 427 U.S. at 358

n.11 ("This Court's decisions have prohibited [State action]...which dampen[s] the exercise...of First Amendment rights, *however slight[ly]*...." (emphasis added)). The Court has never given the States license to engage in "a little bit" of viewpoint discrimination; nor has it permitted them to adopt patronage systems that do not "go too far." *See also* Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting* 24, 59 WM. & MARY L. REV. (forthcoming 2017), http://bit.ly/2weL9aK (hereinafter "Levitt") ("[T]he unconstitutionality of [a] tax on Republican [voter] registration would not depend on the magnitude of the tax.... A $.02 tax on Republican registration is just as unconstitutional as a $200 tax or $2 million tax. The invidious purpose is the constitutional flaw.").

The same should be true when the First Amendment is applied to partisan gerrymanders: "[t]he inquiry" is simply "whether political classifications were used to burden a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J.); *see also Benisek*, 2017 U.S. Dist. LEXIS 136208, at *47, *85 (Niemeyer, J.) ("The harm is not found in any particular election statistic"; rather, "[a] plaintiff[] must show only that [his] electoral effectiveness was...intentionally burdened for partisan reasons"). As long as a partisan-gerrymandering plaintiff meets the modest requirement of Article III injury-in-fact, a showing of invidious intent "is enough." Levitt, *supra*, at 25–30, 57; *see also* Kang, *supra*, at 18.

Next, although the District Court did not agree, some have argued that partisan gerrymandering is actionable only if partisanship "predominated" over

other considerations in the mapmaking process. *See Whitford*, 218 F. Supp. 3d at 888 n.171. This putative requirement, too, is drawn from a branch of this Court's Equal Protection caselaw. *See, e.g.*, *Harris*, 137 S. Ct. at 1463–64. The First Amendment, by contrast, has never required a showing that hostility toward a disfavored viewpoint "predominated" over other State motives. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 431–32 (1996) ("[The] inquiry tests whether the government regulated, *even in part*, on the basis of ideas as ideas...." (emphasis added)); *cf. Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977) (unconstitutional motive need only have been a "motivating factor"). Thus, in a First Amendment partisan-gerrymandering claim, it should not matter whether party was the State's "predominant" consideration. The inquiry, again, "is whether political classifications *were used*." *Vieth*, 541 U.S. at 315 (Kennedy, J.) (emphasis added).

Finally, the correct proof structure under the First Amendment differs from that employed by the District Court below. The District Court believed that it was *the plaintiffs'* burden to prove that the challenged map could not be justified by "legitimate state prerogatives." *Whitford*, 218 F. Supp. 3d at 911. In other words, it appeared to employ rational-basis scrutiny of the type that ordinarily applies in Equal Protection analysis absent a suspect classification such as race. *See FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

The assignment of burden for a First Amendment claim is very different: once the plaintiff shows viewpoint discrimination, strict scrutiny is triggered. The burden shifts *to the State* to demonstrate that the challenged action was justified—and not just by a legitimate interest, but a "paramount" one "of vital importance." *Elrod*, 427 U.S. at 362; *see Vieth*, 541 U.S. at 314–15 (Kennedy, J.) ("If a court were to find that a State did impose burdens...by reason of [political] views, there would likely be a First Amendment violation, unless *the State shows some compelling interest*." (emphasis added)). Moreover, "the burden is on the government to show" that its actions were narrowly tailored to advance that interest. *Elrod*, 427 U.S. at 362–63.

These distinctive features of the First Amendment analysis make that framework superior for analyzing partisan-gerrymandering claims. In particular, they obviate the need for arbitrary line-drawing (*i.e.*, "how much partisanship is too much?") that troubled the plurality and Justice Kennedy in *Vieth*. *See* Levitt, *supra*, at 16–17. The First Amendment approach also provides simple instructions for State legislators: do not use partisan identification in your map-drawing, unless you have a compelling reason for doing so other than raw partisan advantage, and no other way to achieve that goal. This rule respects the States by putting them on clear notice of what they must do to avoid litigation, and at least in the long run, *reduces* the need for judicial intervention.

Unfortunately, the District Court collapsed the plaintiffs' First Amendment and Equal Protection claims into one inquiry that ignored the distinct

analysis that each provision demands. As a result, the court's First Amendment analysis was more complex than it needed to be, and the plaintiffs were held to an excessively heavy burden. They nonetheless met that burden—and the *Common Cause* plaintiffs could too. But neither the plaintiffs in this case nor those in other cases should have to do so.

III. *COMMON CAUSE* IS DIFFERENT FROM THIS CASE IN IMPORTANT WAYS

Besides raising a distinct First Amendment theory, *Common Cause* differs from this case in several other ways that caution against making any universal pronouncements about partisan-gerrymandering claims. First, while this case concerns state-level elections, *Common Cause* concerns Congressional elections. Second, this case is a statewide challenge; *Common Cause* presents both statewide and individual-district challenges. Finally, the type of social-science evidence emphasized in *Common Cause* differs from that considered by the District Court below.

A. Partisan Gerrymanders In Federal Elections Raise Unique Concerns

Some argue that partisan-gerrymandering claims infringe upon federalism because the drawing of legislative districts is a "core sovereign function" of the States. *See, e.g.*, Jurisdiction-Stage Brief for *Amici Curiae* Wisconsin State Senate and Assembly 5. That argument was rejected over 50 years ago in the one-person-one-vote cases. *Compare Baker*, 369 U.S. at 330 (Harlan, J., dissenting) (criticizing the majority for "putting the federal courts into [an] area of state concerns") *with id.* at 231 (majority) (federalism is no

defense "when state power is used as an instrument for circumventing a federally protected right"). The argument is meritless here for the same reason.

But the argument is also inapplicable on its face to *Common Cause* and other cases involving gerrymandering in the drawing of *Congressional* districts. States have no "sovereignty" over *federal* elections; to the contrary, they "can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not [expressly] delegate to them." *U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 801–02 (1995) (quoting Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858)).

The only provision of the Constitution that grants the States any powers with respect to federal elections is the Elections Clause. Thus, "the States may regulate the incidents of [Congressional] elections...only within the exclusive delegation of power under the Elections Clause." *Cook* v. *Gralike*, 531 U.S. 510, 523 (2001). That clause permits States to prescribe only "[t]he Times, Places and Manner of holding Elections." U.S. CONST. art. I, § 4, cl. 1. The term "Manner" is limited to "matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" *Cook*, 531 U.S. at 523–24. Thus, "the Elections Clause [is] a grant of authority to issue *procedural* regulations, and not...a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.* at 524;

see also Thornton, 514 U.S. at 833–34. And even then, the Elections Clause specifies that "Congress may at any time…alter [a State's] Regulations," vitiating any notion that the States are sovereign in this area.

North Carolina's 2016 Plan is a flagrant violation of the Elections Clause, and is therefore inherently *ultra vires*. First, by systematically (and concededly) favoring the election of Republican candidates over Democratic ones, the State obviously "favor[ed]…a class of candidates" and "disfavor[ed]" another. Second, by going so far as to *require* a 10–3 Republican supermajority, the State "dictate[d] electoral outcomes." And third, by denying equal protection of the laws to North Carolina Democrats and infringing their First Amendment rights, the State "evade[d] important constitutional restraints." *Cf. Cook*, 531 U.S. at 524–25 (finding Elections Clause violation where Missouri printed Congressional candidates' positions on term limits next to their names on the ballot, as even that limited act had the effect of "favor[ing] candidates" with certain political views and "disfavor[ing]" others). Just as "sovereignty" and "federalism" provided no defense in *Cook*, they provide no defense in *Common Cause*.[5]

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[5] The Court's one-person-one-vote jurisprudence contains a similar federal/state distinction: while States have leeway to make limited departures from equipopulation in *state-level* districting in order to "pursue other legitimate [State] objectives," *Brown* v. *Thomson*, 462 U.S. 835, 842–43 (1983), they have no such license in *Congressional* districting, *Mahan* v. *Howell*, 410 U.S. 315, 321–22 (1973).

Of course, the question of what standard governs partisan-gerrymandering claims in the Congressional context is not now before the Court. *Amicus*'s point is simply that claims concerning federal elections present unique concerns, and that the Court should therefore take care not to prejudge them here.

B. *Common Cause* Contains Both Statewide And District-Specific Claims

Wisconsin argues that the plaintiffs lack standing to challenge a *statewide* districting plan, and that partisan-gerrymandering claims must proceed, if at all, on an individual-district basis. Appellants' Br. at 28. *Amicus* disagrees. As the District Court concluded, and as plaintiffs explain, they have demonstrated a concrete and particularized injury-in-fact traceable to Wisconsin's enactment of the challenged statewide plan. Appellees' Br. 28–32; *Whitford*, 218 F. Supp. 3d at 927–30. Nothing more is needed for standing.

But even if the Court were to agree with Wisconsin that partisan-gerrymandering claims must proceed on a district-by-district basis, *Common Cause* fits that bill. The plaintiffs in that case include voters in each of North Carolina's 13 Congressional districts, and those plaintiffs alleged and proved that "[t]he 2016 Plan as a whole, *and each of its thirteen individual districts [independently],*" were unconstitutional partisan gerrymanders. Am. Compl., *Common Cause* v. *Rucho*, No. 1:16-cv-1026 (M.D.N.C. Sept. 7, 2016). Thus, however the Court decides the standing issue here, *Common Cause* should be permitted to proceed.

C. *Common Cause* Focuses On Different Social-Science Evidence

Some Justices have called for a quantitative test to separate permissible maps from unconstitutional ones. As explained above, a First Amendment plaintiff should not have to prove that a challenged map meets some quantitative threshold of "severity." To make out a *prima facie* claim, it should suffice to show that "political classifications were used." *Vieth*, 541 U.S. at 315 (Kennedy, J.).

In both this case and *Common Cause*, there is direct, "smoking gun" evidence that "political classifications were used." Appellees' Br. 4–10; *supra* at 6–8. Thus, quantitative proof should not be necessary in either case. But when direct evidence is not available, quantitative, social-science-based methods can provide critical "indirect evidence of partisan purpose." Kang, *supra*, at 4; *see also* Levitt, *supra*, at 49 & n.195 (quantitative methods can "flag[] results sufficiently anomalous to signal the likelihood of troublesome intent"). Both the plaintiffs in this case and in *Common Cause* proffered such quantitative, social-science-based evidence as well. But the nature of that evidence differs somewhat between the two cases.

Below, the plaintiffs relied principally (though not exclusively) on measures of partisan asymmetry, including the "efficiency gap" and "partisan bias." Appellees' Br. 11–17, 37–41; *Whitford*, 218 F. Supp. 3d at 854–55. Wisconsin, for its part, attacks partisan symmetry as "simply a species of proportional representation," Appellants' Br. 23, and argues that these measures fail to account for Republicans' natural geographic advantages in Wisconsin, *e.g.*, the clustering

of Democrats in a few urban areas, *id.* at 50. *Amicus* disagrees with these criticisms for the reasons the plaintiffs and other *amici* discuss.

In *Common Cause*, by contrast, the plaintiffs rely principally on large-scale computer simulations.[6] Their experts, Dr. Jowei Chen (a political scientist from the University of Michigan) and Dr. Jonathan Mattingly (a mathematician from Duke University), used computers to generate many thousands of alternative districting maps, using only neutral principles (*e.g.*, equipopulation, compactness, contiguity, and respecting political boundaries) and omitting any consideration of partisan identification. They then used precinct-level voting data from actual North Carolina elections to determine how many seats each party would have won under each alternative map.

The cumulative results of these simulations formed distributions that were then used to calculate the probability that the 10–3 split under the 2016 Plan resulted from application of traditional districting criteria rather than intentional partisan gerrymandering. *See* Levitt, *supra*, at 12 n.48 (describing simulations such as these as a "powerful tool" to determine "the degree to which the presented partisan consequence...is an outlier, given the other choices the redistricting party might have otherwise cho-

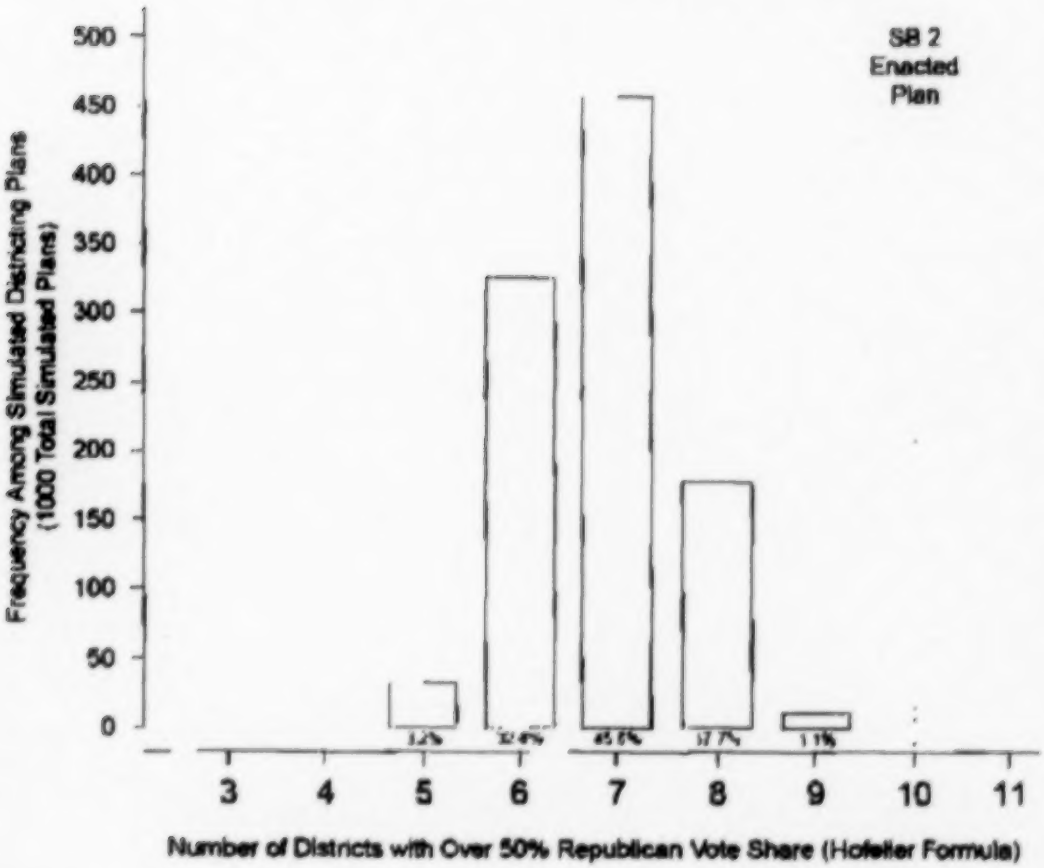
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[6] One of the *Common Cause* experts has used the same simulation technique to evaluate the Wisconsin map at issue here. Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting: An Analysis of Wisconsin's Act 43 Assembly Districting Plan*, 16 ELECTION L. J. (forthcoming 2017), http://bit.ly/2iseDia.

sen"); *cf. Vieth*, 541 U.S. at 312–13 (Kennedy, J.) (new "technologies," such as "[c]omputer assisted districting," may "facilitate court efforts to identify" partisan gerrymanders).

The results of these analyses were stark. Dr. Chen generated three sets of 1,000 maps using different sets of neutral districting criteria. Under most maps, the outcome was 7–6 or 6–7—just as North Carolina's Congressional delegation had historically split. *None* of Dr. Chen's 3,000 alternative maps resulted in a Republican advantage as great as 10–3:

Distribution of Results from One Set of Dr. Chen's Simulated Elections



Dr. Mattingly, meanwhile, generated over 24,000 alternative maps using only neutral districting criteria. Fewer than 0.7% of them resulted in a Republican advantage as lopsided as 10–3. Both experts' results correspond to a probability of *virtually zero* that the results under the 2016 Plan could be attributed to neutral criteria rather than intentional partisan gerrymandering. Stated otherwise, both simulations showed to a statistical certainty that "political classifications," not traditional districting criteria, drove the 2016 Plan. *Vieth*, 541 U.S. at 315 (Kennedy, J.).

Of course, in *Common Cause*, this statistical analysis merely confirmed what the individuals responsible for the 2016 Plan had already expressly admitted. But not all politicians will be so forthright—and in cases lacking such "smoking gun" evidence, this election-simulation method can both (1) establish an objective baseline against which the challenged map can be compared, and (2) permit the reviewing court to make an objective, quantitative determination whether the challenged map deviates sufficiently from that baseline to allow an inference of unconstitutionality. *Vieth*, 541 U.S. at 307–08 (Kennedy, J.). For example, the Court could hold that a plaintiff makes out a *prima facie* First Amendment violation if a simulation of this type shows that it is more likely than not that "political classifications were used." Far from an arbitrary dividing line, reliance on a preponderance of the evidence is ubiquitous in the law.

Further, this simulation technique is immune from both criticisms that Wisconsin lodges against partisan-symmetry measures. First, the simulation technique is not even arguably equivalent to a meas-

ure of deviation from "proportional representation." It has nothing at all to do with statewide partisan-identification figures, or what a "fair" outcome would be in light of those figures. Instead, it is an objective, quantitative method of assessing whether partisanship dictated the drawing of the challenged district lines. Second, the simulation technique necessarily takes a State's natural political geography (*e.g.*, partisan "clustering") into account, since the outcome of each simulated election is determined by *actual voting data* from each geographical precinct.

This Court should affirm the District Court's judgment on the strength of both the direct evidence of partisan intent that the plaintiffs proffered and their corroborating social-science evidence. But if the Court should happen to disagree, it should not conclude that there is *no* "manageable" quantitative method for evaluating a partisan-gerrymandering claim before it has given the *Common Cause* simulation technique its direct consideration.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

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September 5, 2017